Supreme Court, U. S.
FILED
JUL 5 1979
MICHAEL RODAK, JR., CLERK

No. 78-1743

In the Supreme Court of the United States

OCTOBER TERM, 1978

RICHARD J. VAUGHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 3-9) and the opinion on rehearing (Pet. App. 1-2) are not reported. The opinion of the district court (Pet. App. 10) is also not reported.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on April 20, 1979. The petition for a writ of certiorari was filed on Monday, May 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the warrantless search of petitioner's suitcase, abandoned by him in an airport parking lot shortly before his arrest, violated the Fourth Amendment.

STATEMENT

After a jury-waived trial on stipulated facts[1] in the United States District Court for the District of Arizona, petitioner was convicted of possession with intent to distribute lysergic acid diethylamide (LSD), in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment, all but six months of which was suspended, to be followed by two years of special parole. The court of appeals originally reversed the conviction and remanded for further proceedings (Pet. App. 3-9). On rehearing, however, the court vacated its prior order and affirmed the conviction (Pet. App. 1-2).

1. The evidence showed that on September 30, 1976, petitioner and a companion went to the American Airlines ticket counter at Sky Harbor International Airport in Phoenix, Arizona, and sought to purchase first-class tickets for a flight to Chicago (Tr. 4). The ticket agent became suspicious of the two men because their dress, personal appearance and mannerisms, and use of cash to purchase the tickets struck her as "unusual" (Tr. 4-5).

The agent requested petitioner to open his suitcase for inspection (Tr. 6). Inside, she found a box containing small packages of a powder-type substance (Tr. 6-7). When petitioner's companion noticed that the agent was

[1]Petitioner stipulated that the evidence adduced at his suppression hearing would constitute the record for purposes of his trial.

using the telephone, he asked her not to call the police (Tr. 7, 14-15). The agent, however, did call the police and requested petitioner to leave the bag at the ticket counter. Petitioner then grabbed the bag and ran out of the terminal (Tr. 7). Police officers soon arrived and began to search for petitioner (Tr. 18).

As petitioner ran outside the terminal, he left his bag in the parking lot. He then jumped over a fence, and entered a car, which sped off (Tr. 20-21). The car was followed by a police officer and customs inspector, who arrested petitioner on the airport grounds after a short chase (Tr. 22).

Petitioner was taken to the airport terminal's security office. The officers soon located the missing bag in the parking lot with petitioner's name tag still on it. The bag was also taken to the airport security office (Tr. 32).

When petitioner was advised of his constitutional rights following his arrest, he asked to see a lawyer. The interview was then terminated (Tr. 47). Petitioner, however, did not seek to contact counsel or obtain appointed counsel and later stated that he would answer questions without counsel being present (Tr. 59). Petitioner then admitted that he owned the suitcase (*ibid.*).

About two hours after the arrest, a police dog, trained in detecting narcotics, was brought to the security office (Tr. 40). When presented with the suitcase, the dog "alerted," signaling that narcotics were present (Tr. 41). Petitioner was asked for the combination to the lock and gave it to the officers. They then opened the suitcase and found approximately seven pounds of LSD and a small amount of marijuana (Tr. 43, 49).

2. The court of appeals initially reversed petitioner's conviction (Pet. App. 3-9). The court held that under

United States v. *Chadwick*, 433 U.S. 1 (1977), the police officers were required to obtain a warrant before searching the suitcase. However, the court remanded the case to the district court for a determination whether the warrantless search was justified because petitioner abandoned the suitcase (Pet. App. 6, 9). On the government's petition for rehearing, the court vacated its prior order and affirmed the conviction, holding that *Chadwick* does not apply to searches that occurred before the date of that decision.

ARGUMENT

Petitioner contends that this case is controlled by *United States* v. *Chadwick*, *supra*, and that the court of appeals erred in concluding that *Chadwick* does not apply retroactively to invalidate the search conducted in this case.

1. This case is not controlled by *Chadwick* because here, unlike in *Chadwick*, petitioner had abandoned the suitcase before it was seized and searched by the government agents.[2]

As noted above, when petitioner's companion asked the ticket agent not to call the police, petitioner panicked and fled from the terminal carrying the suitcase. A police officer who had been alerted by the ticket agent pursued petitioner out of the building. Petitioner crossed into the airport parking lot, dropped the suitcase, climbed a fence that separated the parking lot from the main road, and entered a waiting car. The car then sped off, but petitioner was arrested after a short chase and was brought to the airport's security office. The officers promptly searched for and discovered the suitcase in the airport parking lot.

[2]In *Chadwick*, the government seized the footlocker from the defendant's possession. See 433 U.S. at 3-4.

Petitioner's actions evidenced his plain intent to abandon the suitcase containing the contraband. See *United States* v. *Robinson*, 430 F. 2d 1141, 1143 (6th Cir. 1970); *Friedman* v. *United States*, 347 F. 2d 697, 704 (8th Cir.), cert. denied, 382 U.S. 946 (1965). He sought to elude capture and punishment by discarding the contraband among the many parked cars in the airport lot. Since the suitcase had been intentionally abandoned by petitioner, the warrantless search and seizure conducted by the officers did not violate the Fourth Amendment. See *Abel* v. *United States*, 362 U.S. 217, 241 (1960); *Hester* v. *United States*, 265 U.S. 57, 58 (1924).[3]

2. Even if *Chadwick* were applicable to this case, the court of appeals correctly concluded (Pet. App. 2) that the decision in *Chadwick* is not retroactive. Accord, *United States* v. *Stewart*, 595 F. 2d 500, 504 & n.7 (9th Cir. 1979) (per curiam); *United States* v. *Mancillas*, 580 F. 2d 1301, 1306-1307 (7th Cir.), cert. denied, No. 78-5480 (Nov. 6, 1978), *United States* v. *Reda*, 563 F. 2d 510, 512 (2d Cir. 1977), cert. denied, 435 U.S. 973 (1978); *United States* v. *Montgomery*, 558 F. 2d 311, 312 (5th

[3]Even assuming that the suitcase was not abandoned, petitioner appears to have consented to the search. As noted above (see page 3, *supra*), petitioner acknowledged during post-arrest questioning that the impounded suitcase belonged to him (Tr. 59). Thereafter, a police dog indicated that narcotics were contained inside the suitcase. One of the police officers then asked petitioner for the combination to the suitcase's lock (Tr. 49). Without objection or hesitation, petitioner gave the officer the combination, the suitcase was opened, and the contraband discovered (*ibid.*).

These facts indicated the voluntariness of petitioner's consent to the search. See *United States* v. *Watson*, 423 U.S. 411, 424-425 (1976); *United States* v. *Mireles*, 570 F. 2d 1287, 1291 (5th Cir. 1978) (consent implied); *United States* v. *Villarreal*, 565 F. 2d 932, 937 (5th Cir. 1978), cert. denied, No. 77-6758 (Oct. 2, 1978) (same). The fact that petitioner was in custody does not "in itself * * * demonstrate a coerced confession or consent to search." *United States* v. *Watson*, *supra*, 423 U.S. at 424.

Cir.), cert. denied, 434 U.S. 927 (1977). While the Eighth Circuit has held to the contrary (*United States* v. *Stevie*, 582 F. 2d 1175, 1178 n.1 (1978) (en banc), cert. denied, No. 78-971 (June 25, 1979)),[4] this case is not a suitable vehicle for resolving the conflict. As discussed above, petitioner's abandonment of the suitcase and his subsequent consent to the search eliminated any need for the officers to obtain a warrant. In any event, the number of pending cases involving pre-*Chadwick* searches is, at this point, so substantially diminished that the question whether that decision should be applied retroactively is not of sufficient importance to merit plenary review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1979

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[4]The question of the retroactivity of *Chadwick* was not raised in our petition in *Stevie* as a ground on which the petition should be granted.

DOJ-1979-07